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ABSTRACT

California's Proposition 8, known as "The Victims' Bill of Rights," contains a safe-schools provision that states: "All students and staff of primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." Through extended reference to federal and state case law, this legal comment attempts to prove that this "inalienable" right to safe schools is much more than a statement of policy. The following legal analysis is established. The constitutional amendment gives students and staff members of public schools the right to school campuses free of crime and violence. That right is enforceable by the California courts without implementing legislation. The courts should enforce the provision by imposing on school districts an affirmative duty to make their schools safe. An increase in costs for school districts should not bar the courts from imposing that duty. After establishing that the right to safe schools is fully enforceable by the courts, the comment suggests two possible damage remedies, one based on tort law and one based on the state constitution. (MLF)

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A Newly Recognized Inalienable Right

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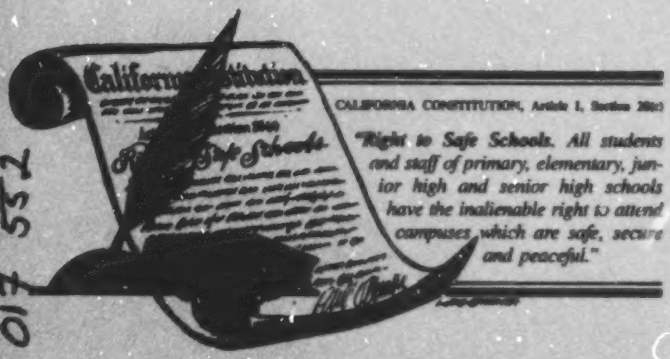

CALIFORNIA CONSTITUTION, Article I, Section 28(c)

"Right to Safe Schools. All students and staff of primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful."

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The Right to Safe Schools

A Newly Recognized Inalienable Right

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Preface

School crime, violence, vandalism and drug abuse are significant problems on far too many school campuses in America. They directly or indirectly effect everyone, especially our nation's students, parents, teachers and other school staff. These problems often spill over into surrounding communities.

Statistics, although ominous, are inadequate to convey the magnitude of school safety problems in America. Suffice it to say they are now so pervasive as to require the sustained personal attention of the President, the Attorney General and the Secretary of Education of the United States.

As the President spoke of school safety and discipline to 2,300 educators in Indianapolis in December, to the public by fireside chat in January, to 8,000 secondary school principals in Las Vegas in February and to 18 top school safety experts at the White House later the same month, some educators reacted defensively. Some even accused the President of playing politics with the subject. Others claimed the problem belonged to the 1970's and was no longer significant.

While it is true the last comprehensive, nationwide study of school crime in all its aspects was published by the National Institute of Education in 1978, facts continue to surface which more than justify the President's continued concern.

Albert Shanker, President of the American Federation of Teachers, while testifying before the Subcommittee on Juvenile Justice of the United States Senate Judiciary Committee, in January, declared, "We know there is continuing school violence. Most national studies documenting this are based on statistics gathered in the late '70's, but we know from reports of individual school systems and our own research that the incidents continue at an unacceptable rate."

While a statistical controversy may continue in some academic circles, the President put the problem in its proper perspective while speaking to the secondary school principals on February 7. "As long as one teacher is assaulted, one classroom disrupted, or one student is attacked, then I must and will speak out to give you the support you need to enforce discipline in our schools," the President declared. "I can't say it too forcefully," he concluded, "to get learning back into our schools, we must get crime and violence out."

It will take substantive programs as well as Presidential emphasis to lift this burden from our schools. That's why the United States Departments of Education and Justice are cooperating in the completion of three pilot projects to find better ways for school districts to use their resources to prevent school crime and violence. Those projects are going on right now in Rockford, Illinois; Jacksonville, Florida; and Anaheim, California. (For more information, contact James "Chips" Stewart of the National Institute of Justice at 202/724-2942.)

That's also why those same federal agencies are cooperating with Pepperdine University to help organize and operate the National School Safety Center. This Center, headquartered in Sacramento, California, will serve the entire nation as

a central resource by providing computerized, school safety clearinghouse and counseling services. (For more information, contact Director Alfred Regnery of the Office of Juvenile Justice & Delinquency Prevention at (202) 724-7751 and Deputy Undersecretary Gary Bauer of the United States Department of Education at (202) 245-7909.)

The Center will be patterned after the California School Safety Center which was formed in the California Department of Justice in 1980 by Governor George Deukmejian who was then the state's attorney general. Deukmejian's successor as attorney general, John Van de Kamp, has continued the school safety program with even greater emphasis. California's Superintendent of Public Instruction, Bill Honig, is equally active on this subject and is cooperating fully with Deukmejian and Van de Kamp.

Los Angeles County Superintendent of Schools, Stuart Gothold, has long played a key role in the effort to restore school safety. On March 1, he conducted his Eighth Annual In-Service Workshop on School-Related Crime, Violence and Vandalism. It was attended by more than 650 educators and law enforcers from throughout the state. None of those attendees would dispute the President's declaration that school safety is still a major problem.

Van de Kamp premiered his office's new film, "Chaos to Calm – Creating Safe Schools," starring Tom Bosley, at Gothold's workshop. This film documents a variety of ways to deal with the subject and features Principal George McKenna of Los Angeles' George Washington Prep School, President Alex Rascon of the California School Peace Officers Association and Director Ann Panizzon of the Center for Law-Related Education. McKenna has recently been commended by the President for turning around the awful problems his school faced just five years ago. (For information on how to obtain copies of the film write or call Director Jack Dugan of the Attorney General's School Safety Center, P. O. Box 13197, Sacramento, CA 95813, (916) 739-5270; for more information on the character education program McKenna uses, see Goble and Brooks, *The Case for Character Education*, Green Hill Publishers, Ottawa, Illinois, 1983; also contact Morton Jackson, Esq., Chairman of the Board, Thomas Jefferson Research Center, (213) 481-1200.)

A panel discussion on "Law in the School: A New Era," was moderated at Gothold's workshop by Dean William Aurian of the Graduate School of Education and Psychology, Pepperdine University, (213) 306-5615. The panelists were Frank Carrington, Esq., of Virginia, (804) 428-1825, a nationally respected crime victims' rights activist who has just written a book, *Victims' Rights Litigation*, which has a major emphasis on school crime victims; Associate Dean Glenn Fait of the University of Pacific's McGeorge School of Law, (916) 739-7117, a prominent administrative law expert with campus disciplinary proceedings expertise; Albert Howenstein, Executive Director of the Governor's Office of Criminal Justice Planning, (916) 366-5304; and this writer, (916) 427-4600.

The law panel explored the significant extent to which law has invaded our schools and the great difficulty with which schools seem to be dealing with that invasion. (See Deukmejian, *Law in the School*, California Department of Justice, 1980; and Van de Kamp, *California Peace Officers Legal Sourcebook*, California Department of Justice, 1984, especially "School-Related Laws," pages 14.14 through 14.35; see also "Children as Crime Victims," pages 14.35 through 14.60, and "Emancipation of Minors," pages 14.61 through 14.62; finally, see *Final Report: The President's Task Force as Victims of Crime*, U.S. Government Printing Office, December, 1982, "Recommendations for Schools," pages 101–105.)

Gothold has been blessed to have John R. Burton to act as chairman of the conference committee which has conducted all eight school crime and violence workshops. Burton is widely recognized as one of the nation's real experts on the subject.

At this most recent conference, Burton declared, "All of us in the field who must daily deal with school crime, violence, vandalism and drug abuse, are deeply grateful to the President for making our jobs easier by focusing public and media attention on the awesome nature and extent of the problems we face. With his continued support, and that of the National School Safety Center, I am confident we can do much to solve these problems in the reasonably foreseeable future."

Governor Deukmejian has continued his intense interest and vigorous commitment to helping. (For further information on school safety from the Governor, contact Al Howenstein at (916) 366-5304.)

With the triad of school safety leadership which has been forged by the President at the national level, and with an analogous triad of school safety leadership now in place in the nation's most populous state, the format for positive, cooperative and effective steps to diminish, and then eliminate crime, violence, vandalism and drug abuse from all our nation's schools is now in place for all to see.

But the solutions to school safety problems do not alone rest in the hands of presidents, governors, educators or law enforcers. Everyone can help restore our schools as special places where students can learn and teachers can teach in peace. While we may sometimes pursue different school safety options, we must, nevertheless, make sure each such option recognizes the theme that we are all in this together. If our schools succeed, we all succeed. If our schools fail, we all fail.

California voters, like the President, have decided they cannot say too forcefully that they are going to restore school safety. They qualified a statewide initiative for the June 8, 1982 ballot, and they voted overwhelmingly to approve it and thereby amend the California Constitution to add Article I, Section 28(c).

That section reads, "*Right to Safe Schools.* All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful."

This is no mere policy statement. How could it be, for it is clearly-stated, binding constitutional law. It is a solid, full self-executing constitutional mandate on an even par with all our other cherished constitutional rights.

A very thoughtful comment on Article I, Section 28(c) has been authored by Kimberly Sawyer, a student at the University of Pacific's McGeorge School of Law. The article, entitled "The Right to Safe Schools: A Newly Recognized Inalienable Right," appears at 14 *Pacific Law Journal* 1309 (1983), and is reproduced here by permission of Ms. Sawyer, Dean Gordon Schaber and the *Pacific Law Journal.*

Whatever the impact of Article I, Section 28(c), court decisions, legislation, or Ms. Sawyer's timely article, it is now clear America has awakened to the vital need to restore school safety. We can all be grateful to the President and, indeed, to all the leaders referenced above, for significantly contributing to that awakening.

It is time all of America's children and teachers again have the opportunity to reach their fullest potentials: to be all they can be. That will only become possible when we, the people, vigorously join the President, and the other courageous

leaders who are working with him, and unequivically resolve to help restore our schools as the temples of learning on the islands of safety they were once and can be once again.

George Nicholson
Director and Chief Counsel
National School Safety Center

1984

The Right to Safe Schools: A Newly Recognized Inalienable Right

In June, 1982, fifty-six percent of California voters approved Proposition 8, known as "The Victims' Bill of Rights."[1] The purpose of Proposition 8, in the words of the initiative's coauthor, Paul Gann, is to "restore victims' rights and help bring violent crime under control."[2] The people of California perceived a need for an initiative designed to fight crime because for the past twenty years the public had seen the courts expand the rights of criminal defendants while the crime rate was escalating.[3] The rising crime rate was attributed to the courts,[4] and judges acquired the reputation of being soft on crime.[5] Proposition 8 was designed in part to eliminate legal rules that favored defendants so that police and prosecutors would be better able to secure convictions of criminals.[6] A concurrent purpose of Proposition 8 was to improve the rights of victims of crime.[7]

Proposition 8 amended the California Constitution to include a recognition of constitutional rights for victims of crime.[8] The initiative added to article I of the California Constitution sections 28(a) through (g).[9] This comment will focus on California Constitution, article I, section 28(c), (hereinafter referred to as the safe schools provision), which guarantees the right to safe schools.[10]

The safe schools provision states: *"Right to Safe Schools.* All students and staff of primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful."[11] Some school administrators believe the safe schools provision is merely a statement of policy and claim procedures to promote safety on school campuses are currently in effect.[12] This

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1. L. A. Daily J., Sept. 7, 1982, at 1, col. 2.
2. *See* Cal. Voter Pamphlet, Primary Election, June 1982, at 34 (copy on file at the *Pacific Law Journal*).
3. *A 'Victims' Bill of Rights'*, NEWSWEEK, June 14, 1982, at 64.
4. *See id.*
5. Schrag, *Crime on the Ballot*, THE NEW REPUBLIC, June 2, 1982, at 10, 11.
6. *See A 'Victims' Bill of Rights'*, *supra* note 3, at 64.
7. *See* Cal. Voter Pamphlet, *supra* note 2, at 34.
8. *See* CAL. CONST. art. I, § 28.
9. *See id.*
10. *Id.* §28(c).
11. *Id.*
12. L. A. Daily, J., Apr. 7, 1982, at 2, col. 5.

comment will prove that this "inalienable" right to safe schools is much more than a statement of policy.

The right to safe schools is a viable, enforceable right. Through rules of constitutional construction, the right to safe schools may be interpreted to give students and staff members of public schools the right to school campuses free of crime and violence.[13] The right is enforceable by the California courts without implementing legislation.[14] This comment will demonstrate that the courts should enforce the safe schools provision by imposing on school districts an affirmative duty to make their schools safe.[15] A court, by giving the safe schools provision a common sense interpretation, should find that the school districts have a duty to make their schools safe.[16] Additionally, a court will impose the duty by relying on federal and California cases which subscribe to the principle that public entities may not withhold protection of constitutional rights if that withholding actually deprives people of a constitutional right.[17] Lastly, in imposing an affirmative duty, a court will rely on the school desegregation cases which hold that school districts are obligated to alleviate segregation in the schools to protect minority students' constitutional rights.[18]

The comment will include a discussion of the costs involved in making schools safe. The possible cost of security measures, although substantial, will not be a bar to courts imposing an affirmative duty on school districts to make their schools safe.[19] After establishing that the right to safe schools is fully enforceable by the courts, this comment will suggest two possible damages remedies, one based on tort law and one based on the Constitution. Before a discussion of the enforceability of the safe schools provision, the provision itself must be interpreted. To understand fully the meaning of the safe schools provision, an examination must be made of the events leading to its inclusion in the Victims' Bill of Rights.

The Need for a Safe Schools Provision

Student misbehavior has manifested itself in increasingly violent ways over the past thirty years.[20] Between 1950 and 1968, most incidents of misconduct consisted of pranks and disorders easily dealt with

13. *See infra* notes 71-120 and accompanying text.
14. *See infra* notes 126-65 and accompanying text.
15. *See infra* notes 170-263 and accompanying text.
16. *See infra* notes 181-204 and accompanying text.
17. *See infra* notes 207-40 and accompanying text.
18. *See infra* notes 241-61 and accompanying text.
19. *See infra* notes 266-300 and accompanying text.
20. Patsey, *Curbing Violence and Vandalism in Our Schools: A Judicial View of What Must Be Done*, THRUST, Oct. 1981, at 11.

by warnings and suspensions.[21] During the late sixties, students as a group, generally became more aggressive and prone to violence.[22] This trend of crime and violence on school campuses has not decreased,[23] and today students and staff of public schools must attend schools where drug dealing,[24] theft, robbery, rape and murder are common occurrences.[25]

The violence and vandalism that are currently sweeping the nation's schools[26] are also present in the public schools of California.[27] Research completed in 1981 by the California Department of Education revealed the following: over a five month period at least 100,000 incidents of violence occurred on school campuses; on the average twenty four teachers were assaulted and 215 students were attacked daily; confiscation of weapons by school officials was common-place; and property damage due to crime amounted to approximately ten million dollars.[28] These incidents of crime and violence may be attributed to juveniles. Juvenile arrests in California, as well as the nation, doubled between 1964 and 1974.[29] Although some targets of juvenile crime are adults who are victimized off school campuses,[30] most juvenile crime victims are fellow students or teachers, with school campuses increasingly becoming the scene of crime.[31] In the 1980 edition of *Law in the School*, then Attorney General of California, George Deukmejian, stated that the problem of crime and violence on school campuses is now so severe that the learning environment is seriously impaired.[32]

The 1980 Legislature also recognized that crime and violence on school campuses were becoming a serious problem.[33] The Legislature added five sections to the California Education Code that dealt with school safety and security.[34] The first section of the Code recognized a need to deal with crime and violence on school sites by creating effective techniques and programs to combat the crime and violence;[35] the

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21. *Id.*
22. NATIONAL INSTITUTE OF EDUCATION, VIOLENT SCHOOLS--SAFE SCHOOLS at 2 (Jan. 1978).
23. *Id.* at 3.
24. CAL. DEP'T OF JUSTICE, LAW IN THE SCHOOL at 14 (3d ed. 1980) [hereinafter cited as LAW IN THE SCHOOL].
25. Patsey, *supra* note 20, at 11.
26. *Id.*
27. Deukmejian, *Preface* to CAL. DEP'T OF JUSTICE, LAW IN THE SCHOOL, at v (3d ed. 1980) [hereinafter cited as Deukmejian].
28. Elder, *Achieving School Safety in the 80s*, STOP CRIME, Winter 1982, at 4.
29. Deukmejian, *supra* note 27, at v.
30. *Id.* at vi.
31. *Id.*
32. *Id.* at vii.
33. CAL. EDUC. CODE §32250.
34. *See id.* §§32250-32254.
35. *Id.* §32250.

second section created the School Safety and Security Resources Unit (hereinafter referred to as Resources Unit) in the Department of Education to fulfill the need for safety and security.[36] The function of the Resources Unit was to identify effective programs being used by some school districts and inform other districts of those programs,[37] to provide technical assistance to school districts implementing crime fighting programs[38] and to ascertain the causes of school violence and inform school districts of those causes.[39] The fourth section obligated the Department of Education to evaluate the effectiveness of the Resources Unit;[40] the fifth section provided that the sections on school safety and security would only become effective if specifically appropriated funds were made available.[41]

The California Department of Justice attempted to deal with the increase in violent crime by opening the School Safety Center (hereinafter referred to as Center) in Sacramento in 1980.[42] The goal of the Center is to restore safety in the schools by providing leadership and direction in reducing crime on campuses.[43] Some of the key components of the Center are a Law Enforcement Assistance Administration grant which will develop crime prevention programs for elementary schools,[44] availability of Center staff for technical assistance in solving specific problems of school crime,[45] and a program to alert the public to the school safety issues and encourage public support for remedial measures.[46]

Another indication of the need for a constitutional amendment providing for safer schools was the filing of a lawsuit in 1980 by the California Attorney General against the Los Angeles Unified School District (hereinafter referred to as LAUSD).[47] The underlying premise of the lawsuit was that students and educators had the right to learn and teach in a peaceful environment.[48] The People ex rel. George Deukmejian (hereinafter referred to as plaintiffs) alleged the excessive level of violence present in the LAUSD schools deprived attending stu-

36. *Id.* §32251. The original Resources Unit has since been abolished due to poor staff; a new unit is being developed.
37. *Id.* §32252(a).
38. *Id.* §32252(b).
39. *Id.* §32252(c).
40. *Id.* §32253.
41. *Id.* §32254.
42. Cal. Dep't. of Justice, Office of the Attorney General Release, at 1 (Sept. 5, 1980) (copy on file at the *Pacific Law Journal*) [hereinafter cited as Attorney General Release].
43. *Id.*
44. *Id.* at 2.
45. *Id.* at 3.
46. *Id.*
47. *Id.* at 1.
48. *Id.*

dents of their constitutional rights.[49]

Each of plaintiffs' five arguments centered on the fact that excessive levels of violence on school campuses effected a denial of plaintiffs' constitutional rights:[50] (1) the plaintiffs alleged when the students were required to attend school, the excessive level of violence at school violated the students' rights against cruel or unusual punishment;[51] (2) when the excessive level of violence disrupted the students' learning environment, the students were denied their fundamental right to a free public education;[52] (3) the excessive level of violence at school denied the students their fundamental right to personal security;[53] (4) the students were denied equal protection of the laws when substantial disparities existed in the level of violence between the LAUSD and other school districts;[54] and (5) when the government assigned the students to a school with an excessive level of violence, the students did not receive proper educations; hence, the government acted unreasonably, violating the substantive due process rights of the students.[55] The plaintiffs contended that defendant LAUSD was responsible for protecting each of the constitutional rights denied to the students.[56] Based upon the above arguments, plaintiffs sought a declaratory judgment of the constitutional rights of students attending LAUSD schools and the duties of the defendant in relation to the students' rights.[57]

The defendant LAUSD demurred to plaintiffs' complaint.[58] The Superior Court of Los Angeles County sustained defendant's demurrer, and plaintiffs appealed that decision to Division Four of the Second District Court of Appeal.[59] After plaintiffs filed their appellate brief, the safe schools provision was approved by California voters, and plaintiffs incorporated the provision into their closing argument.[60] The plaintiffs argued, in addition to their other arguments, that the students'

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49. Plaintiff's Response to Defendant's Demurrer at 1, People *ex rel*. George Deukmejian, No. C 323360 (Sup. Ct. County of L. A. filed May 21, 1980) (copy on file at the *Pacific Law Journal*).

50. *See infra* notes 51-55 and accompanying text.

51. Plaintiff's Response to Defendant's Demurrer at 33, No. C 323360.

52. *Id*. at 59.

53. *Id*. at 84.

54. *Id*. at 76; *see also id*. at 88 (violation of equal protection was based on the fundamental right to personal security as well as the fundamental right to education).

55. Appellant's Opening Brief at 42, People *ex rel*. George Deukmejian, Nos. 64340 and 64341 (Ct. of Appeal Cal. filed —, 1982).

56. *E.g.*, Plaintiff's Response to Defendant's Demurrer at 62, No. C 323360; *see also id*. at 87.

57. *Id*. at 1.

58. *See generally* Plaintiff's Response to Defendant's Demurrer, No. C 323360 (Defendants must have demurred or this response would not have been filed).

59. Office of the Attorney General, Analysis of Proposition 8 (June 9, 1982); *see also* Telephone conversation with Robert Murphy, Deputy Attorney General (Nov. 30, 1982) (notes on file at the *Pacific Law Journal*).

60. Appellant's Closing Brief at 2, Nos. 64340 and 64341.

right to safe, secure and peaceful campuses was violated by excessive levels of violence at school.[61] Plaintiffs requested the court to declare that defendant LAUSD had a duty to take action to protect the constitutional rights of students.[62] The appellate court, however, sustained defendant's demurrer holding that the school district did not have an affirmative duty to make the schools safe.[63] Plaintiffs appealed this decision to the Supreme Court of California but that court denied plaintiffs' petition for a hearing.[64]

The necessity for a safe schools provision is evidenced (1) by the recognition that crime and violence on school campuses is a serious problem[65] and (2) by the attempts to solve that problem including the School Safety Center[66] and the Attorney General's lawsuit against the LAUSD.[67] The newly recognized inalienable right to safe schools is another attempt to solve the problem of crime and violence on school campuses.[68] The Attorney General recognized the potential of the safe schools provision by adding the provision to his appellate brief to support the proposition that school districts have a duty to protect students from violence while the students are attending school.[69] One purpose of this comment is to demonstrate that enforcement of the safe schools provision requires the courts to place an affirmative duty on school districts to make their schools safe.[70] Before discussing how the courts will enforce the safe schools provision, the provision must be interpreted.

Interpreting the New Provision

The safe schools provision states: "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful."[71] The safe schools provision is a constitutional provision,[72] and the interpretation of a constitutional provision is guided by certain general rules of construction.[73] The first step in interpreting a constitu-

61. *See id.* at 8.
62. *See id.* at 70.
63. Sacramento Bee, March 10, 1983, Section A, at 5, col. 2.
64. *Id.* at 5, col. 1.
65. Cal. Educ. Code §§32250-32254.
66. *See* Attorney General Release, *supra* note 42, at 1.
67. *See id.*
68. *See infra* notes 71-122 and accompanying text.
69. *See* Appellant's Closing Brief at 8, Nos. 64340 and 64341.
70. *See infra* notes 170-263 and accompanying text.
71. Cal. Const. art. I, §28(c).
72. *See id.*
73. *See generally* 13 Cal. Jur. 3d *Constitutional Law* §§35-40 (discusses the methods of interpreting constitutional language).

tional provision is to examine the language on the face of the provision.[74] Each word, phrase and sentence must be given its plain meaning, and only if the meaning is doubtful or ambiguous may other sources be used for interpretation.[75] This section interprets the safe schools provision by applying the above analysis.

A. "Inalienable Right"

The safe schools provision provides that students and staff of public schools, elementary through senior high school, have an "inalienable right" to safe campuses.[76] Black's Law Dictionary defines "inalienable" as incapable of being surrendered or transferred.[77] Accordingly, inalienable rights are not given by the government nor may they be taken away or impaired by the government.[78] Inalienable rights are those important and basic rights which stem from the fundamental principles of the American system of government.[79] In California these highly regarded rights are embodied in article I of the California Constitution, the Declaration of Rights.[80] Inalienable rights, however, exist independent of the Constitution and are inherent in every person.[81] The inalienable right to safe schools, then, is inherent in each student and staff member of a public school and is so fundamental to each that the government may not terminate the right.[82] Therefore, because the right to safe, secure and peaceful campuses is recognized as inalienable, the right should be seriously considered by courts. in interpreting the right, and by school officials, in applying the right, as a viable right rather than a mere policy statement.[83] The inalienable right to safe schools is confined to students and staff of public schools. The next step to interpreting the safe schools provision is to define the class of persons protected under this important right; therefore, "students and staff" must be interpreted.

B. "Students and Staff"

Webster's Dictionary clearly defines a student as a person who is enrolled for study at school.[84] The meaning of staff, however, is not as

74. State Board of Education v. Levit, 52 Cal. 2d 441, 462, 343 P.2d 8, 20 (1959).
75. *Id.*
76. *See* CAL. CONST. art. I, §28(c).
77. BLACK'S LAW DICTIONARY 683 (5th ed. 1979).
78. *See id.* (definition of inalienable); *see also infra* notes 79-81 and accompanying text.
79. *See* People v. Washington, 36 Cal. 658, 662 (1869) (overruled on other grounds in People v. Brady, 40 Cal. 198); *see also* 13 CAL. JUR. 3d *Constitutional Law* §223 (1974).
80. *See* CAL. CONST. art. I §1.
81. *In re* Quarg, 149 Cal. 79, 80, 84 P. 766, 766 (1906).
82. *See supra* notes 76-81 and accompanying text.
83. *See supra* notes 76-82 and accompanying text.
84. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2268 (1971).

clear. Webster's Third New International Dictionary defines staff as the personnel responsible for the functioning of an institution.[85] The safe schools provision does not indicate which of the personnel responsible for the functioning of the school constitutes staff.[86] The meaning of staff, then, is unclear, and extrinsic aids must be used for interpretation.[87] Examples of extrinsic aids are official reports of the California Constitution Revision Commission,[88] records of debates,[89] legislative committee reports,[90] contemporaneous interpretation,[91] written arguments in voter pamphlets,[92] public policy[93] and the evils sought to be remedied by the provision.[94]

The meaning of staff may be ascertained by examining the evil sought to be remedied by the safe schools provision.[95] The evil sought to be remedied by the safe schools provision is the presence of violent crime on school campuses.[96] Victims of violent crime on school campuses have included teachers and janitors.[97] A logical conclusion is that one of the evils sought to be remedied by the safe schools provision is the victimization of teachers and janitors.[98] This extrinsic aid, the evils sought to be remedied, demonstrates that the meaning of staff should include at least teachers and janitors[99] and may be extended to include any personnel responsible for the functioning of the school that may be victimized by crime, such as administrators and counselors.[100] Thus far, this comment has established that students and all staff members have an inalienable right to attend safe, secure and peaceful campuses. What is meant by a safe, secure and peaceful campus will be discussed next.

C. "Safe, Secure and Peaceful"

The meaning of each word, safe, secure and peaceful, is not particu-

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85. *Id.* at 2219.
86. *See* CAL. CONST. art. I, §28(c).
87. *See* 52 Cal. 2d at 462, 343 P.2d at 20.
88. Mosk v. Superior Court, 25 Cal. 3d 474, 495, 601 P.2d 1030, 1045, 159 Cal. Rptr. 494, 509 (1979).
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. Massachusetts Mut. Life Ins. Co. v. City and County of San Francisco, 129 Cal. App. 3d 876, 881, 181 Cal. Rptr. 370, 372 (1982) (quoting English v. County of Alameda, 70 Cal. App. 3d 226, 233-34, 138 Cal. Rptr. 634, 638).
94. *Id.*
95. *See infra* notes 96-100 and accompanying text.
96. *See infra* notes 111-22 and accompanying text.
97. *See* Deukmejian, *supra* note 27, at v, vi.
98. *See supra* notes 96-97 and accompanying text.
99. *Id.*
100. *See supra* notes 85-99 and accompanying text.

larly ambiguous. Webster's Dictionary defines safe as "secure from threat of danger, harm, or loss."[101] Danger, harm or loss, however, may come from many sources such as fire, earthquake, or crime, but the dictionary does not indicate any specific source.[102] This same problem arises when defining secure and peaceful. The definition of secure is "free from danger" or "free from risk of loss."[103] Peaceful is defined as "untroubled by conflict, agitation, or commotion."[104] Again, neither of the definitions indicates the source of the danger or the agitation.

Extrinsic aids must be referred to in determining what is a safe, secure and peaceful campus because of the ambiguities involved in the definitions of safe, secure and peaceful. The extrinsic aids available for interpreting the safe schools provision include a committee analysis of the safe schools provision, evidence of the intent of the voters who approved Proposition 8, and the California Supreme Court's recent ruling on the constitutionality of Proposition 8.[105] Other extrinsic aids such as official reports of the California Constitution Revision Commission and records of debates are not available because Proposition 8 was not proposed by the legislature, but was passed under the initiative process by the people of California.[106]

The first extrinsic aid is an analysis of the safe schools provision by the Assembly Committee on Criminal Justice.[107] The report discusses the possibility of deploying municipal police to school campuses to enforce the safe schools provision.[108] Common sense dictates that police would not be necessary to protect students and staff from ordinary accidents; more likely the police will be deployed on school campuses to protect students and staff from crime because repressing crime is a typical law enforcement function.[109] A logical conclusion is that a safe, secure and peaceful campus is one that is free from crime.[110]

An important extrinsic aid for interpretation is evidence of the intent and objective of the drafters of the safe schools provision and the people by whose vote the provision was adopted. This intent and objective

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101. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1998 (1971).

102. *See id.*

103. *Id.* at 780.

104. *Id.* at 620.

105. *See infra* notes 107-119 and accompanying text.

106. *See* Brosnahan v. Brown, 32 Cal. 3d 236, 240, 651 P.2d 274, 276, 186 Cal. Rptr. 30, 32 (1982).

107. ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE, ANALYSIS OF PROPOSITION 8, (1982) (report to the California Legislature of 1982).

108. *Id.* at 7.

109. *See* People v. Seely, 66 Cal. App. 2d 408, 412, 152 P. 2d 454, 456 (1944); *see also* 42 CAL. JUR. 3d *Law Enforcement* §57 (1974).

110. *See supra* notes 107-109 and accompanying text.

may be ascertained from written arguments in voter pamphlets.[111] The written arguments in the June, 1982, voter pamphlet do not specifically address the safe schools provision;[112] however, the objectives of Proposition 8 as a whole are discussed.[113] The overall objectives of Proposition 8 may be applied to the individual provisions of the initiative.[114] All three arguments in favor of Proposition 8 discuss the problem of high crime rates and violence:[115] "It is time for the people to take decisive action against violent crime,"[116] "Crime has increased to an absolutely intolerable level,"[117] "Your 'Yes' vote on Proposition 8 will restore victims' rights and help bring violent crime under control."[118] These statements indicate that the intent of the voters in passing Proposition 8 was to fight back against crime. This overall intent may be applied to the safe schools provision thus leading to the conclusion that the voters desired school campuses to be free from crime and violence.

The above interpretation is amply supported by the California Supreme Court's recent ruling in *Brosnahan v. Brown*.[119] The *Brosnahan* court ruled that Proposition 8 did not violate the single subject rule of the California Constitution.[120] The court also declared that article I, section 28, subdivision (c), the safe schools provision, was intended to encompass safety only from criminal behavior.[121] The new constitutional right to safe schools is designed to protect students and staff from crime and violence while attending public schools.[122] The next section is a two part discussion of how this right will be enforced. The first part will demonstrate that the safe schools provision is a self-executing right that does not require implementing legislation to be enforced by the courts.

Enforceability of the Safe Schools Provision

Some school officials view the safe schools provision simply as a pol-

111. Mosk v. Superior Court, 25 Cal. 3d 474, 495, 601 P. 2d 1030, 1045, 159 Cal. Rptr. 494, 509 (1979).
112. *See* Cal. Voter Pamphlet, *supra* note 2, at 34-35 (written arguments on Proposition 8).
113. *See id.*
114. *See Brosnahan v. Brown*, 32 Cal. 3d at 247,65 ! P.2d at 280, 186 Cal. Rptr. at 36.
115. *See* Cal. Voter Pamphlet, *supra* note 2, at 34 (written arguments on Proposition 8).
116. *Id.*
117. *Id.*
118. *Id.*
119. 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).
120. *Id.* at 253. The California Constitution provides that initiative measures submitted to electors must embrace only one subject or the initiative will be deemed to have no effect. Cal. Const. art. II, §8, subd. (d). Although Proposition 8 had ten sections, the Brosnahan court held that all sections shared a common purpose of promoting the rights of crime victims; therefore, the initiative satisfied the single subject rule. 32 Cal. 3d at 247.
121. *Id.* at 248.
122. *See supra* notes 101-121 and accompanying text.

icy statement.[123] A policy statement itself does nothing active toward fighting crime on school campuses, and this interpretation is contrary to the intent of the voters, as postulated in the previous section, that schools be free from crime and violence.[124] This section will show the safe schools provision mandates that school districts have an affirmative duty to make their schools safe.[125] Before the courts will order the school districts to make their schools safe, the courts must determine that the safe schools provision is enforceable without implementing legislation.

A. The Right to Safe Schools is Enforceable Without Implementing Legislation

California Supreme Court Justice Mosk and Chief Justice Bird criticized Proposition 8 for containing no legislation that purported to implement the right to safe schools.[126] If legislation is necessary to implement this right, the right to safe schools is not self-executing,[127] and the courts may not enforce the provision until appropriate legislation is provided.[128] On the other hand, if the right is self-executing, it is immediately operative and the courts may enforce its provisions.[129]

A constitutional provision is self-executing if no legislation is necessary to give effect to the provision and if there is nothing to be done by the Legislature to put the provision into operation.[130] A provision is not self-executing if language or circumstance indicate that implementing legislation was contemplated to put the right into effect.[131] The courts determine if a constitutional provision is self-executing by examining the provision under several established rules.

One method used to determine whether a constitutional provision is self-executing is to look at the language of the provision, and if the language indicates the subject of the provision is referred to the Legislature for action, the provision is not self-executing.[132] In *Taylor v. Madigan*[133] the provision in question was article XVII, section 1, of the

123. L. A. Daily J., April 19, 1982, at 2, col. 5.
124. *See supra* notes 111-18 and accompanying text.
125. *See infra* notes 170-263 and accompanying text.
126. 32 Cal. 3d at 274-75, 651 P.2d at 297, 186 Cal. Rptr. at 53 (1982) (Bird, C.J., dissenting); *see also* Brosnahan v. Eu, 31 Cal. 3d 1, 11-12, 641 P.2d 206, 181 Cal. Rptr. 106 (1982) (Mosk, J., concurring and dissenting).
127. Ewing v. Oroville Mining Co., 56 Cal. 649, 653 (1880); *see also* 13 CAL. JUR. 3d *Constitutional Law* §31 (1974).
128. Spinney v. Griffith, 98 Cal. 149, 151-52, 32 P. 974, 975 (1893).
129. Winchester v. Mabury, 122 Cal. 522, 523-24, 55 P. 393 (1898).
130. Taylor v. Madigan, 53 Cal. App. 3d 943, 951, 126 Cal. Rptr. 376, 381 (1975).
131. *Id.*
132. 53 Cal. App. 3d at 951, 126 Cal. Rptr. at 381 (1975).
133. *Id.* at 943, 126 Cal. Rptr. at 376 (1975).

California Constitution which states "the Legislature shall protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families."[134] That provision was held not self-executing because of the express language stating the Legislature shall create an exemption of a homestead.[135] This language indicates that the Constitution itself does not provide a homestead exemption.[136] The provision would have been self-executing if the provision had only stated a homestead is exempt.[137]

There is no express language in the safe schools provision directing the Legislature to take action in any way associated with the safe schools provision.[138] The constitutional provision simply states that students and staff of public schools *have* the inalienable right to attend safe campuses.[139] The language here indicates that the Constitution itself guarantees the right, *not* the Legislature.[140] If the courts use the express language method of determination adopted in *Taylor v. Madigan*, then the safe schools provision may be self-executing.[141]

In *Taylor*, the court gives another test to determine the self-executing nature of a constitutional provision. If the constitution fixes the nature and extent of the right conferred and the liability imposed so that they may be determined by examining and construing the terms of the provision, the constitutional provision must be self-executing.[142] The right conferred by the safe schools provision is the inalienable right of students and staff of public schools to attend safe, secure and peaceful campuses. The nature and extent of this right have been determined by general rules of construction in the previous section of this comment[143] and may be summarized as the right of students and staff members of public schools to be safe from criminal behavior.[144] The nature and extent of the liability imposed may also be determined by examining the terms of the provision. The safe schools provision is an inalienable right meaning the right, as embodied in the California Constitution, is

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134. CAL. CONST. art. XVII, §1.

135. 53 Cal. App. 3d at 951, 126 Cal. Rptr. at 381.

136. *See id.*

137. *See id.*

138. *See* CAL. CONST. art. I, §28(c).

139. *Id.*

140. *See* 53 Cal. App. 3d at 951, 126 Cal. Rptr. at 381. The language in the Homestead provision expressly stated the Legislature shall protect homesteads. The language here does not mention the Legislature at all and, therefore, is an indication that the constitution guarantees the right to safe schools.

141. *See supra* notes 132-140 and accompanying text.

142. 53 Cal. App. 3d at 951, 126 Cal. Rptr. at 381.

143. *See supra* notes 72-122 and accompanying text.

144. *See supra* notes 72-122 and accompanying text.

protected against government impairment.[145] The liability imposed, then, by the safe schools provision is a liability of the state when the state is responsible for infringing the students' or staff members' right to be free from criminal behavior.[146] The nature and extent rule indicates that the safe schools provision is self-executing.

A self-executing constitutional provision has also been defined as a provision that supplies a sufficient rule whereby the right given may be enjoyed and protected, or the duty imposed may be enforced.[147] This rule was applied by the court in *Unger v. Superior Court*[148] to California Constitution, article II, section 6 which provides, "Judicial, school, county, and city offices shall be non-partisan."[149] The *Unger* court held the constitutional provision was self-executing and supported that holding by deciding the provision adequately supplied a rule by which the duty imposed could be enforced.[150]

This rule may be applied to the safe schools provision. The *Unger* court focused on a sufficient rule whereby the duty imposed could be enforced. The pertinent question regarding the safe schools provision, however, would be whether there is an adequate rule whereby the right conferred may be enjoyed and protected.[151] If the *Unger* court could find an adequate rule to enforce a duty imposed in simple language like "[j]udicial, school, county, and city offices shall be non-partisan," then an adequate rule to protect a right conferred could also be found in the more detailed language of the safe schools provision that "students and staff of primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure, and peaceful."[152] Furthermore, the *Unger* court emphasized the fact that the people had constitutionally commanded that the offices be non-partisan in determining the provision was self-executing.[153] This same emphasis would support the determination that the safe schools provision is self-executing because the provision was also commanded by the people of California.[154]

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145. *See* Logan v. U. S., 144 U.S. 263, 281 (1892) (civil rights declared in constitutions are guaranteed against state aggression); *see also* 13 CAL. JUR. 3d *Constitutional Law* §223 (1974).

146. *See supra* note 145.

147. Flood v. Riggs, 80 Cal. App. 3d 138, 154, 145 Cal. Rptr. 573, 582 (1978).

148. 102 Cal. App. 3d 681, 162 Cal. Rptr. 611 (1980).

149. CAL. CONST. art. II, §6.

150. 102 Cal. App. 3d at 687, 162 Cal. Rptr. at 614-15.

151. *See* CAL. CONST. art. I, §28(c); *see also id.* art. II, §6. The safe schools provision's language on its face confers a right to students and staff. The language of CAL. CONST. art. II, §6, however, indicates a duty to keep those offices nonpartisan.

152. *See* 102 Cal. App. 3d at 687, 162 Cal. Rptr. at 614; *see also* CAL. CONST. art. I, §28(c).

153. 102 Cal. App. 3d at 687, 162 Cal. Rptr. at 614.

154. *See* 32 Cal. 3d at 240-41, 651 P.2d at 276-77, 186 Cal. Rptr. at 32-33. The safe schools provision was an initiative placed on the ballot under the initiative and referendum power of the Constitution. In a sense, then, the people have commanded that the school campuses be safe.

Other evidence lends support to the determination that the inalienable right to attend safe, secure and peaceful campuses is self-executing. In the past, constitutions were written to give only the outlines of a government, but today, constitutions are written in a very detailed, statutory-like manner. Constitutional provisions are presumed to be self-executing because of this trend unless there is clear evidence to the contrary.[155] Nothing in the safe schools provision indicates that the right would not be operative until the Legislature acted;[156] therefore, the safe schools provision is presumed to be self-executing.[157] This presumption is compatible with the policy underlying self-executing provisions.[158] These provisions are necessary because if a constitution were dependent on the acts of the Legislature, beneficial provisions of the constitution might be delayed because of the inability of legislators to agree on implementing legislation.[159]

California courts have held that other inalienable rights are self-executing, such as the right to privacy[160] and the right to free speech and press.[161] The courts are generally conclusionary, stating only that the provision is self-executing,[162] but their conclusion is appropriate for the following reason. A self-executing provision is one that is in effect immediately and does not depend on the Legislature to give it life.[163] An inalienable right is also, by definition, not dependent on the Legislature for existence, for inalienable rights are not granted by the government but inherent in every person.[164] The courts, therefore, are justified in concluding that inalienable rights are self-executing.

According to the rules used to determine the self-executing nature of a constitutional provision, the inalienable right to safe schools must be self-executing.[165] This determination is consistent with the presumption that constitutional provisions are self-executing[166] and with the policy underlying the existence of self-executing provisions.[167] The courts may enforce the safe schools provision without implementing

155. 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* §38 (8th ed. 1974).
156. *See* CAL. CONST. art. I, §28(c).
157. *See supra* notes 155-56 and accompanying text.
158. *See* Scott v. Larson, 82 Cal. App. 46, 50, 255 P. 248, 249-50 (1927).
159. *Id.*
160. *E.g.*, Porten v. University of San Francisco, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839, 842 (1976).
161. *See* Laguna Publishing Co. v. Golden Rain Found. of Laguna Hills, 131 Cal. App. 3d 816, 851 n.16, 182 Cal. Rptr. 813, 834 (1982).
162. 64 Cal. App. 3d at 829, 134 Cal. Rptr. at 842.
163. Winchester v. Mabury, 122 Cal. 522, 523-24, 55 P. 393 (1898); 13 CAL. JUR. 3d *Constitutional Law* §31 (1974).
164. *See In re* Quarg, 149 Cal. 79, 80, 84 P. 766 (1906).
165. *See supra* notes 126-64 and accompanying text.
166. *See* WITKIN, *supra* note 155, §38.
167. *See* 82 Cal. App. at 50, 255 P. at 249-50.

legislation once the provision is determined to be self-executing.[168] The courts may enforce the right by imposing an affirmative duty on school districts to make their schools safe.[169] The next section is an examination of the processes the courts may use to impose this duty. These processes consist of reliance upon constitutional interpretation, federal and California case law determining that a public entity may not withhold protection if the withholding deprives a person of constitutional rights and California case law providing that school districts have an affirmative duty to desegregate schools.

B. An Affirmative Duty to Make Schools Safe

Courts will play a very important role in enforcing the inalienable right to safe schools since the function of a court is to interpret the Constitution and define the constitutional rights of citizens of this state.[170] Additionally, courts must vigorously protect the rights embodied in the safe schools provision as the duty of the courts is to guard those rights created by the people through their reserved powers of initiative and referendum.[171] To protect the constitutional right of students and staff of public schools to attend safe, secure and peaceful campuses, the courts must find that school districts have an affirmative duty to make their schools safe.[172]

A major obstacle to imposing an affirmative duty on school districts is the provisions of the California Constitution generally placing restrictions upon the powers of the state.[173] In the context of inalienable rights, this principle may be understood to mean that inalienable rights, embodied in the Constitution, are merely guaranteed against state impairment.[174] Accordingly, the inalienable right to safe, secure and peaceful campuses would not be violated until the state acted to deprive students and staff of their right to safe, secure and peaceful campuses.[175]

This interpretation, however, would not adequately guarantee the right to be free from violence and crime on school campuses since inaction has been recognized as a significant cause in the increase of crime

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168. *See supra* notes 126-67 and accompanying text.
169. *See infra* notes 170-263 and accompanying text.
170. Nourse v. Douglas, 7 Cal. 65, 70 (1857); *see also* 13 CAL. JUR. 3d *Constitutional Law* §96 (1974).
171. 32 Cal. 3d at 241, 651 P.2d at 277, 186 Cal. Rptr. at 33.
172. *See infra* notes 173-263 and accompanying text.
173. *See* Methodist Hosp. v. Saylor, 5 Cal. 3d 685, 691, 488 P.2d 161, 164, 97 Cal. Rptr. 1, 5 (1971); *see* 13 CAL. JUR. 3d *Constitutional Law* §223 (1974); *see also id.* §224.
174. *See supra* note 173.
175. *Id.*

on school campuses.[176] In 1980, a task force of the Association of California School Administrators (hereinafter referred to as ACSA) made a study of student discipline problems, including violence and vandalism, and discovered that school districts actually contributed to the problem because of their inaction.[177] While most school boards are genuinely outraged at poor student behavior and violent acts, they do not consider themselves responsible for eliminating the problem.[178]

Asa Reeves, 1981 urban services executive at ACSA, is opposed to the view that school boards have no responsibility to make their schools safe:

> Our inaction contributed to the lack of discipline and allowed violent acts to become a part of the school environment. . . . we cannot wait for the attorney general, the probation department, the courts or the Legislature to solve the problem but instead must take matters into our own hands.[179]

This point of view is embodied in the safe schools provision as ascertained through rules of interpretation.[180]

1. An Affirmative Duty By Interpretation

Imposing an affirmative duty on school districts to make their schools safe may be based on rules of constitutional construction. One long recognized rule is that new provisions must be considered in reference to the prior state of the law and the mischief intended to be remedied by the new provisions.[181] Another established rule of construction is that constitutional enactments must be given a practical, common sense construction which will meet changed conditions and the growing needs of the public.[182]

An examination of the law prior to the enactment of Proposition 8 reveals that school officials do have some responsibility to protect the safety of students and staff members of public schools.[183] School officials have a duty to maintain an orderly campus so the education, teaching and training of students may be accomplished in an atmosphere of law and order.[184] Pursuant to this duty, the school official may suspend, expel, or exclude from school students who have dis-

176. Reeves, *We Let It Happen—We Can Change It*, THRUST, Oct. 1981, at 8, 9.
177. *Id.*
178. *Id.*
179. *Id.* at 10.
180. *See infra* notes 181-204 and accompanying text.
181. People v. Stephens, 62 Cal. 209, 233 (1882).
182. Cooperrider v. San Francisco Civil Serv. Comm'n, 97 Cal. App. 3d 495, 502, 158 Cal. Rptr. 801, 805 (1979).
183. *See infra* notes 184-89 and accompanying text.
184. *In re* Donaldson, 269 Cal. App. 2d 509, 512, 75 Cal. Rptr. 220, 222 (1969).

played behavior inimical to the welfare of other students.[185] The behavior that merits suspension, expulsion or exclusion must be criminal or violent in nature.[186] Although the authority to rid schools of students who commit criminal or violent acts appears to work directly on removing crime and violence from school campuses, the provisions which govern the suspension, expulsion and exclusion of students from school are only grants of authority to school officials to rid their schools of students who have already committed violent or criminal acts or who have already displayed vicious characters.[187]

Some provisions do place a duty on school officials to guard against student misconduct. For example, the school official has a duty to prescribe rules for governing the discipline of students.[188] The Code providing for this duty was amended in 1977 to place a duty on the principal of a high school to make sure that students are informed of the disciplinary rules at the beginning of each school year.[189] Creating and communicating a clear, concise policy on student misconduct is instrumental to the control of violence and vandalism on school campuses.[190] The 1980 ACSA task force discovered most school districts either had no policies on student misconduct or had not communicated existing policies to the people most affected.[191]

The state of the law prior to the enactment of the safe schools provision includes no active program to rid schools of crime and violence.[192] The suspension, expulsion and exclusion laws which deal specifically with criminal and violent acts are merely grants of authority to suspend, expel or exclude students *after* the act has occurred.[193] This passive method of dealing with violence and crime may not be adequate today when theft, arson, rape, murder and drug dealing are common events on school campuses.[194] Indeed, juvenile arrests doubled between 1964 and 1974 and continued to increase throughout the 1970's.[195] From 1974 to 1978 the number of juvenile deaths due to homicide

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185. *See* CAL. EDUC. CODE §§48900, 48904.5, 48211.

186. A student may be suspended or expelled for nine acts. *See id.* §48900(a)-(i). Six of the nine acts are criminal or violent in nature. *See id.* §48900(a)-(f). The student may be excluded from school for displaying filthy or vicious habits. *Id.* §48211.

187. *See generally, id.* §48900. From the language in the Code it is obvious the student's misconduct must have already occurred. Also, the Code does not say a principal shall suspend, which indicates suspension is a discretionary duty.

188. *Id.* §35291.

189. *Id.*

190. Reeves, *supra* note 176, at 10.

191. *Id.* at 9.

192. *See infra* notes 193-202 and accompanying text.

193. *See* CAL. EDUC. CODE §48900(a)-(f).

194. *Patsey, supra* note 20, at 11; *see also* LAW IN THE SCHOOL, *supra* note 24, at 14.

195. *See* Deukmejian, *supra* note 27, at v.

alone increased 107 percent.[196]

The evils sought to be remedied by the safe schools provision are crime and violence.[197] A construction of the safe schools provision allowing school districts to do no more than they are doing now will not further the intent of the voters who approved this provision.[198] While the suspension and expulsion laws are designed to rid the schools of students who have violent or criminal natures,[199] those laws are not effective until after the criminal or violent act has occurred.[200] Also, even though school officials already have a duty to create and communicate clear disciplinary policies for students,[201] this duty does not appear to be strictly implemented.[202] A logical conclusion is that the voters desired a strong affirmative duty to be placed on school officials to prevent crime and violence on school campuses.

This construction is a practical and common sense interpretation of the safe schools provision and will meet the changed conditions and the growing needs of the public. As one commentator suggested, school district inaction actually promotes violence and vandalism on school campuses.[203] If the mandate of the safe schools provision is to prevent crime and violence, a common sense interpretation would require the school district to act.[204] The safe schools provision should be interpreted to mandate that an affirmative duty be placed on school districts to make their schools safe. Federal and California case law supports this interpretation.[205] Federal case law intimates that a public entity may be obligated to act in order to protect constitutional rights.[206] The next section discusses the applicability of this principle to California school districts.

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196. *Id.* at vi.

197. *See supra* notes 107-122 and accompanying text.

198. *See* Reeves, *supra* note 176, at 9. The intent of the voters is to rid the schools of crime and violence. When the school districts do not actively fight those evils, this intent of the voters is thwarted, especially when the inaction may be said to be a cause of the crime and violence.

199. *See* CAL. EDUC. CODE §48900; *see also id.* §48904.5.

200. *See supra* note 187.

201. *See* CAL. EDUC. CODE §35291.

202. *See* Reeves, *supra* note 176, at 9. The task force found that most school districts had no disciplinary policies.

203. *Id.*

204. When school districts have actively sought to prevent crime and violence on school campuses they have been successful. The Hayward Unified School District was able to reduce crime by using a computer monitor system. Harris, *Cramping Your Arsonist's Style and Cutting Energy Costs—All by Computer*, THRUST, Oct. 1981, at 18. Los Angeles Unified School District has implemented a program which links the juvenile court, district attorney and public defender offices with the school system in order to identify violence prone juveniles and help them to adjust to normal school life. Thompson, *Vandalism—Cutting Techniques that Worked For Us*, THRUST, Oct. 1981, at 12.

205. *See infra* notes 207-40 and accompanying text.

206. *See infra* notes 207-27 and accompanying text.

2. An Affirmative Duty by Analogy to Federal Case Law

The idea that a public entity has an affirmative duty to protect constitutional rights is not new to the courts. In a dissenting opinion of a 1951 United States Supreme Court case, Justice Black argued that policemen had a duty to protect a speaker from a hostile audience in order to allow the speaker to exercise his first amendment rights.[207] This, of course, is contrary to the principle that constitutional rights are merely guaranteed against government interference.[208] Federal courts, however, have subscribed to the idea that the public entity must affirmatively act to protect constitutional rights when nonaction causes a deprivation of those rights.[209]

This principle was applied by the United States Supreme Court in *Terry v. Adams*.[210] In Texas, a private association called the Jaybird Party excluded all black voters of the county from being members.[211] Each election year, the Jaybird Party elected people who were to enter the Democratic primaries for nomination to run for county offices in the county elections.[212] The people who were elected by the Jaybird Party to run in the Democratic primaries were invariably nominated to run for county offices.[213] The Court held the state was responsible for the actions of the Jaybird Party in discriminating against blacks even though the association was not controlled by the state.[214] The Court then held the state was obligated to protect the constitutional rights of black voters although the Jaybird association, rather than the state, was actually responsible for the infringement of the voter's rights.[215]

Other federal cases have held that state protection of constitutional rights may not be withheld. In *Lynch v. United States*,[216] a state sheriff surrendered a prisoner to a mob of Ku Klux Klansmen who proceeded to beat the prisoner.[217] The court of appeals held that the prisoner's right to equal protection included the right of protection by the arresting officer against injury by third persons.[218] Although in Lynch, under the cause of action used, the sheriff had to have intended to deprive the prisoner of his rights,[219] the court recognized that denial of

207. Feiner v. New York, 340 U.S. 315, 327 (1951) (Black, J., dissenting).
208. *See supra* note 173.
209. *See infra* notes 210-27 and accompanying text.
210. 345 U.S. 461, 465 (1953).
211. *Id.* at 463.
212. *Id.*
213. *Id.*
214. *See id.* at 469.
215. *Id.*
216. 189 F.2d 476 (5th Cir. 1951).
217. *Id.* at 480.
218. *Id.* at 479.
219. *Id.* at 480.

constitutional rights could be brought about by official inaction.[220] In this case, where the sheriff's action was necessary to protect the prisoner, the sheriff was not allowed to deny protection willfully.[221] In a similar factual setting, the circuit court in *Catlette v. United States*[222] held that a sheriff, who had detained Jehovah's Witnesses, after they had requested protection while carrying on their work, could not deny protection to the Jehovah's Witnesses from a town mob.[223] In failing to protect the Jehovah's Witnesses from group violence, the sheriff denied them equal protection of the laws.[224]

A school district certainly may argue that these federal cases are inapplicable to the school district because it has not intended to deny to students and staff members of public schools any constitutional rights as did the sheriffs in *Catlette* and *Lynch*. A crucial fact in those cases, however, was that the sheriffs did have the power to afford protection to their detainees, yet in both cases protection was not attempted. A school district has the authority to protect its students' health and welfare just as the sheriffs had the authority to protect their detainees.[225] If a school district may, by simple action, successfully protect students against violence,[226] then the district should not be allowed to refuse to protect students and staff members. Inaction by the school district violates the constitutional right of students and staff to be safe from crime and violence while attending school. This conclusion is consistent with the holdings of *Catlette* and *Lynch* that the sheriffs' inaction was a deprivation of their detainees' constitutional rights.

The United States Supreme Court and the federal circuit courts have evidenced the position that when government action could prevent a deprivation of federal constitutional rights, action should not be denied.[227] California courts have also subscribed to this position. The California Supreme Court has ordered the California Legislature to reapportion itself to protect voters' rights[228] and certain California school districts to desegregate to protect students' rights.[229]

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220. *Id.* at 479.
221. *Id.*
222. 132 F.2d 902 (4th Cir. 1943).
223. *Id.* at 907; *see also id.* at 903.
224. *Id.* at 907.
225. *See* CAL. EDUC. CODE §44807. This is one method whereby the school officials may protect students' health. Other methods are the power to suspend and expel. *See id.* §48900; *see also id.* §48904.5.
226. *See* Reeves, *supra* note 176, at 10 (simple communication of a disciplinary policy proves successful in cutting crime and violence).
227. *See supra* notes 207-26 and accompanying text.
228. *See* Legislature v. Reinecke, 6 Cal. 3d 595, 598, 492 P.2d 385, 387, 99 Cal. Rptr. 481, 483 (1972).
229. *See* Crawford v. Board of Education, 17 Cal. 3d 280, 284, 551 P.2d 28, 30, 130 Cal. Rptr. 724, 726 (1976).

3. An Affirmative Duty by Analogy to California Case Law

The California Supreme Court proscribed government inaction in *Legislature v. Reinecke*,[230] (hereinafter referred to as *Reinecke I*). The court found the legislative apportionment in 1972 violated the constitutional principle of one man, one vote.[231] The Legislature was required to enact valid reapportionment statutes in time for the 1972 elections.[232] The California Supreme Court retained jurisdiction over the subject matter to draft reapportionment plans itself in the event that the Legislature failed to adopt plans for the 1974 through 1980 elections.[233] The Supreme Court later adopted apportionment plans pursuant to its retained jurisdiction in a second *Legislature v. Reinecke*[234] (hereinafter referred to as *Reinecke II*). Although the Legislature is required by the California Constitution to reapportion itself after a ten year census, the *Reinecke* cases stand for the idea that when citizens' constitutional rights are in jeopardy, the court will not tolerate inaction.[235]

In *Reinecke I*, the court recognized that reapportionment was solely a job for the Legislature and only after the court recognized that reapportionment might not occur in time for the 1972 elections did the court itself provide the action to protect the voters' equal protection rights.[236] If the court is willing to get involved in a job left to the Legislature, the court must feel strongly about protecting constitutional rights and will not hesitate to order government action.[237] A logical conclusion is that the court will also not tolerate inaction on the part of school districts, especially when protection of students is in the province of the school district, and will not hesitate to order the school districts to make schools safe.

Other public officials besides legislators have a duty to prevent violations of California citizens' constitutional rights. A current body of constitutional law holds that a criminal defendant is denied equal protection and due process of the law at his indictment when there has been an intentional exclusion from the grand jury of a particular class of persons in the community.[238] Public officials who compile jury lists are constitutionally restrained from excluding whole classes of people

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230. *See* 6 Cal. 3d at 398, 492 P.2d at 387, 99 Cal. Rptr. at 483.
231. *Id.* at 601, 492 P.2d at 387, 99 Cal. Rptr. at 485.
232. *Id.* at 603, 492 P.2d at 391, 99 Cal. Rptr. at 487.
233. *Id.* at 604, 492 P.2d at 391, 99 Cal. Rptr. at 487.
234. *See* 10 Cal. 3d 396, 400-401, 516 P.2d 6, 8-9, 110 Cal. Rptr. 718, 720 (1973).
235. 6 Cal. 3d at 598, 492 P.2d at 387, 99 Cal. Rptr. at 483. In Reinecke I, the court threatened to use its power to impose reapportionment plans to ensure voter equality. The court carried out the threat in Reinecke II.
236. 6 Cal. 3d at 598, 492 P.2d at 386-87, 99 Cal. Rptr. at 482.
237. *See id.*
238. *See* People v. Superior Court, 38 Cal. App. 3d 966, 970, 113 Cal. Rptr. 732, 735 (1974).

in the community from the lists.[239] These official compilers, however, must do more than merely avoid purposeful discrimination. They have an affirmative duty to insure the procedures used to select potential jurors actively work toward achieving a well balanced cross-section of the community.[240] The affirmative duty to remedy discrimination is not limited to public officials compiling jury lists. The school official also has a duty to remedy discrimination.

The strongest support for imposing a duty on school districts to make their schools safe is found in school desegregation cases.[241] In 1954, the United States Supreme Court ruled that segregated school systems violated the Equal Protection Clause of the United States Constitution.[242] In a series of cases the Court began to order school districts to implement plans designed to rid the school systems of segregation.[243] The Court finally decided in *Green v. County School Board*[244] that school boards have the duty to devise a plan to desegregate their schools without delay.[245] The California Supreme Court has similarly ruled that segregated school systems in this state violate the Equal Protection Clause of the Constitution.[246]

Pursuant to a finding that segregation violates the equal protection clause, the California Supreme Court in *Crawford v. Board of Education*[247] held that school districts are obligated to undertake reasonable steps toward alleviating school segregation.[248] The court also held that the school district did not have to be the cause of the segregation.[249] The rationale of this decision is two-fold. First, segregated schools have traditionally had a detrimental effect on minority children,[250] and second, in the state of California education is a fundamental right which should not be impaired.[251]

If the courts may order a school district to take steps to alleviate segregation in the school system, the courts should also order the school district to take steps to alleviate crime and violence on school cam-

239. *Id.* at 972, 113 Cal. Rptr. at 736.
240. *Id.*
241. *See generally* Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963); Crawford v. Board of Education, 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976).
242. Brown v. Board of Educ., 247 U.S. 483, 495 (1954).
243. *See* J. NOWAK, R. ROTUNDA, J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 564-66 (1978).
244. 391 U.S. 430 (1968).
245. *Id.* at 438-39.
246. Jackson v. Pasadena, 59 Cal. 2d 876, 880, 382 P.2d 878, 880-81, 31 Cal. Rptr. 606, 608-609 (1963).
247. 17 Cal. 3d 280, 130 Cal. Rptr. 724, 551 P.2d 28, 130 Cal. Rptr. 724 (1976).
248. *Id.* at 302, 551 P.2d at 42, 130 Cal. Rptr. at 738.
249. *Id.*
250. *Id.* at 296.
251. *Id.* at 297.

puses. Crime and violence certainly have a harmful effect on the education process as does segregation.[252] Segregation impairs the learning process by impeding academic achievement of the minority student.[253] Crime and violence, because of the fear they create in students, impede the academic achievement of all students.[254] Another aspect of the *Crawford* court's decision to impose an affirmative duty to desegregate was that the school district had plenary authority over the governance of its schools and could adopt nondiscriminatory policies.[255] The school district today also has the authority to govern the safety of students[256] and, therefore, can adopt plans to make schools safe.

One major complaint of school districts may be that school districts do not cause crime and violence on school campuses.[257] This complaint is valid because the cause of juvenile violence and vandalism is generally unknown, and none of the typically named causes of violence is the school district itself.[258] The school districts in the segregation cases also complained that they were not the cause of segregation.[259] The courts, nevertheless, held that the cause of the segregation was immaterial,[260] and the school district was not relieved of its duty when the cause of segregation was, for example, a racially imbalanced neighborhood.[261] Pursuant to this reasoning, the courts will be justified in imposing an affirmative duty on school districts to make their schools safe regardless of the cause of the crime and violence.

By placing an affirmative duty on school boards to make their schools safe, the courts would be interpreting the safe schools provision in a practical, common sense manner. This would certainly further the intent of the voters who approved the safe schools provision.[262] In addition, an affirmative duty on school boards comports with the principle espoused in federal and state cases that public entities should take action to protect constitutional rights if inaction by the entity deprives people of a constitutional right.[263] One effect of implementing the safe schools provision in this manner is to increase the costs of security in

252. Deukmejian, *supra* note 27, at vii; *see also* 17 Cal. 3d at 296, 551 P.2d at 38, 130 Cal. Rptr. at 734.
253. *See* 17 Cal. 3d at 296, 551 P.2d at 38, 130 Cal. Rptr. at 734.
254. *See* Deukmejian, *supra* note 27, at vii.
255. *See* 17 Cal. 3d at 296, 551 P.2d at 38, 130 Cal. Rptr. at 734.
256. *See supra* note 245.
257. *See* Halatyn, *Proper Research is Vital to Cutting School Crime*, STOP CRIME, Winter 1982, at 13.
258. *See* Patsey, *supra* note 20, at 11.
259. *See* 17 Cal. 3d at 285, 551 P.2d at 30, 130 Cal. Rptr. at 726; *see also* 59 Cal. 2d at 881, 382 P.2d at 881, 31 Cal. Rptr. at 609.
260. 59 Cal. 2d at 881, 382 P.2d at 881, 31 Cal. Rptr. at 609.
261. *Id.*
262. *See supra* notes 111-18 and accompanying text.
263. *See supra* notes 207-62 and accompanying text.

the schools.[264] Any increase in costs that may occur if the school district is charged with an affirmative duty to make schools safe should not bar the courts from imposing that duty.[265]

Cost is Not a Bar to the Imposition of an Affirmative Duty

Petitioners in *Brosnahan v. Brown*[266] sought to invalidate Proposition 8 partly because the costs incurred in implementing the safe schools provision would be so extensive that the functioning of the public school system would be severely impaired.[267] The California Supreme Court summarily characterized petitioner's theory as conjecture and speculation[268] and refused to invalidate Proposition 8 although implementation might entail substantial public funding.[269] Although the California Supreme Court held the possible costs of implementing the safe schools provision did not severely impair the functioning of school systems,[270] costs of implementation may be substantial especially if the courts impose an affirmative duty on school districts to make their schools safe.[271] Security measures used by schools are often expensive,[272] and a school may have difficulty in funding security plans. School districts, therefore, may assert that courts should not place an affirmative duty on them to make schools safe because funds are not available to meet the costs necessary to implement appropriate security measures.[273]

The claim that insufficient funds relieve school districts of their affirmative duty to make schools safe is not a defense supportable by case law.[274] The federal courts have repeatedly held inadequate resources do not excuse the state from curing unconstitutional practices.[275] The federal district court in *Brenneman v. Madigan*[276] held when a pretrial detainee awaits trial in jail simply because he cannot post bail,[277] the purpose of his confinement is only to assure his presence at trial.[278]

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264. *See* Cal. Voter Pamphlet, *supra* note 2, at 32 (fiscal effects).
265. *See infra* notes 266-300 and accompanying text.
266. 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).
267. *Id.* at 258, 651 P.2d at 287, 186 Cal. Rptr. at 43.
268. *See id.*
269. *Id.* at 260, 651 P.2d at 288, 186 Cal. Rptr. at 44.
270. *See id.* at 259-60, 651 P.2d at 288, 186 Cal. Rptr. at 44.
271. *See supra* notes 170-263 and accompanying text.
272. *See* Harris, *Cramping Your Arsonist's Style and Cutting Energy Cost—All by Computer*, THRUST, Oct. 1981, at 19.
273. *See* Plaintiff's Response to Defendant's Demurrer at 132, No. C 323360 (Sup. Ct. County of L. A. filed May 21, 1980).
274. *See infra* notes 275-86 and accompanying text.
275. *See infra* notes 276-86 and accompanying text.
276. 343 F. Supp. 128 (N. D. Cal.) (1972).
277. *See id.* at 135 (definition of pre-trial detainee in this context).
278. *See id.* at 138.

The purpose of confinement of a person convicted of crime, however, is punishment and rehabilitation.[279] Constitutionally, then, the pretrial detainee may only be deprived of his right to come and go as he pleases and may not be confined under the same conditions as convicted prisoners. The court held that suitable facilities had to be built to hold pretrial detainees,[280] and lack of staff, facilities and finances would not excuse the jail administrators from their duty to protect the constitutional rights of pretrial detainees.[281]

The *Brenneman* holding that lack of resources does not excuse the state from curing unconstitutional practices was reaffirmed in *Smith v. Sullivan*.[282] The *Smith* court affirmed a ruling by the United States District Court for the Western District of Texas that the conditions of an El Paso County jail constituted a violation of the federal constitutional guarantee against cruel and unusual punishment.[283] The District Court Judge ordered a detailed program to improve the conditions of confinement at the jail.[284] The program included various projects such as an exercise and rehabilitation program, a ventilation and lighting program, a medical program and a jail personnel, safety and supervision program.[285] The *Smith* court rejected the county officials' argument they lacked funds to implement the trial court's order because the deprivation of constitutional rights can never be justified by inadequate resources.[286]

As stated previously, the California courts may enforce the right to safe schools by placing an affirmative duty on school districts to make their schools safe.[287] When the school district asserts this duty is excused because there are no available funds to implement security measures at schools, the district asserts a defense that is not tolerated in the federal courts as a defense to the affirmative duty of the state to protect federal constitutional rights. If alleged, this defense should be equally disallowed against affirmatively protecting state constitutional rights.

In each federal case discussed above, the court ordered the state to eliminate conditions that not only deprived persons of their constitutional rights, but that also deprived them of their physical health and mental well-being.[288] To a certain extent, the unhealthy conditions

279. *Id.*
280. *See id.* at 139.
281. *Id.*
282. 553 F.2d 373 (5th Cir.) (1977).
283. *Id.* at 378.
284. *See id.* at 375.
285. *See id.* at 375-76.
286. *See id.* at 378.
287. *See supra* notes 170-263 and accompanying text.
288. *See* 553 F.2d at 375; *see also* 343 F. Supp. at 133.

under which students and staff members attend schools in California approach the severity of those found in the jails of Texas and California.[289] Crime and violence found on school campuses would certainly violate the constitutional right to attend safe, secure and peaceful campuses. Also, crime and violence on school campuses threaten the physical health and mental well-being of students and staff of public schools.[290] This situation, because it is analogous to the federal court situation, should prompt the California courts to adopt the principle that school districts may not argue inadequate funds to be relieved of their duty to make schools safe.

The inadequate funds defense may also be discredited on the basis of article I, section 22 of the California Constitution. This section provides that all constitutional provisions are mandatory and prohibitory unless the provision expressly indicates otherwise.[291] The safe schools provision states that all students and staff *have* the inalienable right to safe schools.[292] Since there is no express language in the text of the safe schools provision indicating the provision is *not* mandatory and prohibitory, then the safe schools provision *is* mandatory and prohibitory.

The effect of this conclusion is that all state entities, legislative, executive or judicial, must obey the constitutional provision.[293] The meaning of a constitutional provision, ascertained by rules of construction, actually determines what must be obeyed.[294] As previously determined through rules of construction, the safe schools provision may be interpreted to impose an affirmative duty on school districts to make schools safe. This affirmative duty is, therefore, mandatory and should not be disregarded for any reason including cost. The California Supreme Court in *Jenkins v. Knight*[295] held that the governor was commanded by article IV, section 12 of the California Constitution to call a special election to fill legislative vacancies.[296] The Governor was not permitted to avoid this duty even though his motive in not calling an election was to avoid expenses.[297] While the Governor in *Jenkins* did not argue there were no funds to hold special elections,[298] the *Jenkins* opinion evidences a position not to allow constitutional provisions to be depen-

289. Students today must attend schools that are riddled by rapes, murders, theft and muggings. *See* Patsey, *supra* note 20, at 11.
290. Deukmejian, *supra* note 27, at vii.
291. CAL. CONST. art. I, §22.
292. *Id.* §28(c).
293. *See* 13 CAL. JUR. 3d *Constitutional Law* §29 (1974).
294. Clark v. City of Los Angeles, 160 Cal. 30, 40-41, 116 P. 722, 726 (1911).
295. 46 Cal. 2d 220, 293 P.2d 6 (1956).
296. *Id.* at 224, 293 P.2d at 8.
297. *See id.* at 225, 293 P.2d at 9.
298. *See id.*

dent on outside factors like cost.[299] The school district's mandatory duty to make schools safe also should not be dependent on cost.

An order that schools have a duty to make schools safe may seem harsh when the school districts claim they have no funds to pay for security measures, but these claims of inadequate funds carry less weight now that education has been given the highest cost of living adjustment of any program in the newly proposed budget of California.[300] Once established that the courts will enforce the safe schools provision by imposing an affirmative duty on school districts to make their schools safe and the cost is not a bar to the duty, the next inquiry is what remedies are available for violations of the right to safe schools. Two likely remedies afforded by a violation of the safe schools provision would be injunction and damages.[301] The next section will examine primarily the causes of action for damages.

Damages as a Remedy for Deprivation of the Right to Safe Schools

The safe schools provision does not specify a particular remedy for a violation of its terms.[302] This, of course, does not mean that a remedy is not available. If a constitutional provision is self-executing, for example, injunctive relief is available without legislation providing a remedy.[303] Since the safe schools provision is self-executing, at least injunctive relief is available against the school district when it violates the constitutional rights of students and staff. An injunction may be prohibitory, when the school district would be ordered to refrain from violating the right, or mandatory, when the school district would be ordered to take affirmative action to cure the violation.[304] A mandatory injunction imposed on the school districts to protect students and staff against crime and violence is an appropriate remedy.

Courts have already manifested an intent to order school districts to protect the constitutional rights of students in the school desegregation cases. In *Crawford v. Board of Education*[305] the California Supreme Court stated the school district had an obligation to undertake reason-

299. *Id.*

300. Sacramento Union, Jan. 11, 1983, at 1, col. 4. The proposed budget of Governor Deukmejian provides a six percent cost of living adjustment to education levels kindergarten through senior high school. In addition to the six percent increase, the proposed budget provides three million dollars to suppress drug abuse in schools. *Id.*

301. *See infra* notes 302-54 and accompanying text.

302. *See* Cal. Const. art. I, §28(c).

303. See Laguna Publishing Co. v. Golden Rain Found., 131 Cal. App. 3d 816, 851 n.16, 182 Cal. Rptr. 813, 834 (1982), wherein the court holds that the free speech clause is self-executing, and thus, injunctive relief is available without enabling legislation.

304. Dosch v. King, 192 Cal. App. 2d 800, 804, 13 Cal. Rptr. 765, 768 (1961).

305. 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724.

ably feasible steps to alleviate school segregation.[306] The court also stated when the school board could not demonstrate an immediate commitment to instituting such steps, the court would intervene to protect the constitutional rights being violated.[307] The intervention would be formulating a plan to alleviate segregation which the school district would be ordered to adopt.[308]

If the courts are willing to grant a mandatory injunction ordering the school district to desegregate, then they also ought to grant a mandatory injunction ordering the school district to make its schools safe. This remedy is certainly consistent with the mandate of the safe schools provision that school districts must make their schools safe.[309] The effect of such a mandatory injunction, then, is that the school district must undertake reasonably feasible steps to alleviate crime and violence on school campuses.[310] If the school district fails to implement any steps, the courts will intervene and impose their own plan for alleviating crime and violence on school campuses.[311]

This remedy of injunctive relief and judicial intervention is not the only method for vindicating a violation of the constitutional right to safe schools. There is no guarantee that a school district will implement even a court ordered plan, or if the district does implement a plan, that the district will adequately carry out the plan's measures. Another remedy available to the student and staff member of a public school, then, is damages. Damages may be afforded under two theories, a tort theory and a constitutional theory.

A. The Tort Claims Act

As previously discussed, the tort liability of a government entity, either at the state level or local level, is governed by the Tort Claims Act.[312] Section 815(a) of the Tort Claims Act states that a public entity is not liable for the negligence of the public entity or a public employee unless a statute so provides.[313] Thus, for the school district to be liable for damages, a specific statute needs to be found that sets forth the liability.[314]

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306. *Id.* at 302, 551 P.2d at 42, 130 Cal. Rptr. at 738.
307. *Id.* at 306-07, 551 P.2d at 45, 130 Cal. Rptr. at 741.
308. *Id.* at 307, 551 P.2d at 46, 130 Cal. Rptr. at 742.
309. *See supra* notes 170-263 and accompanying text.
310. *See* 17 Cal. 3d at 302, 551 P.2d at 42, 130 Cal. Rptr. at 738.
311. *See id.* at 307, 551 P.2d at 46, 130 Cal. Rptr. at 742.
312. Rubino v. Lolli, 10 Cal. App. 3d 1059, 1063, 89 Cal. Rptr. 320, 322 (1970); *see generally* CAL. GOV'T CODE §§ 810-996 (setting forth the statutes by which the Government may be held liable); *see also* 35 CAL. JUR. 3d *Government Tort Liability* §1 (1974).
313. *See* CAL. GOV'T CODE §815(a).
314. *See id.*

In the school safety situation, the school district may be liable for damages under the Tort Claims Act, section 815.6.[315] This section provides that when the public entity has a mandatory duty imposed by an enactment to protect against a particular kind of injury, the public entity is liable for any injury that proximately occurs by its failure to carry out the duty unless the entity has used reasonable diligence to carry out the duty.[316] The California Law Revision Commission interpreted this section to mean that when a statutory or regulatory standard is not adhered to, negligence occurs unless there has been reasonable diligence to comply with the standards.[317]

The safe schools provision is not a statute or a regulation; nevertheless, section 815.6 may apply. The first requirement of section 815.6 is that a mandatory duty be imposed on a public entity by an enactment.[318] A school district is certainly a public entity as contemplated by the Tort Claims Act.[319] The question remains whether the safe schools provision is an enactment which imposes a mandatory duty.

Section 810.6 of the Tort Claims Act defines enactment as a "constitutional provision, statute, charter provision, ordinance or regulation."[320] The safe schools provision is a constitutional provision and is, therefore, an enactment as contemplated by the Tort Claims Act. "Mandatory," as defined by this section, refers to duties which the public entity must perform and not to those powers which the public entity may or may not choose to exercise.[321] The safe schools provision as a constitutional provision is mandatory by definition.[322] If the courts impose an affirmative duty on school districts to make their schools safe, the first requirement of section 815.6 will be met. The school district has a mandatory duty to make schools safe imposed by an enactment, the safe schools provision.

The second requirement is that the enactment be designed to protect against a particular kind of injury.[323] The most obvious type of injury the safe schools provision is designed to prevent is injury to students and staff members of public schools due to crime or violence.[324] The

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315. *See id.* §815.6.
316. *Id.*
317. *Id.* §815.6 (Law Review Commission comment on section 815.6).
318. *See id.* §815.6.
319. School districts have been held liable for damages under the Tort Claims Act. *E.g.*, Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 747, 470 P. 2d 360, 363, 87 Cal. Rptr. 376, 379 (1970).
320. CAL. GOV'T CODE §810.6.
321. Morris v. Marin County, 18 Cal. 3d 901, 908, 559 P.2d 606, 610, 136 Cal. Rptr. 251, 255 (1977).
322. *See* CAL. CONST. art. I, §22.
323. *See* CAL. GOV'T CODE §815.6.
324. *See supra* notes 101-22 and accompanying text.

injury would not be limited to injuries due to attacks upon the physical person of students and staff members.[325] The injury could also be damage to or loss of property due to crime and violence.[326]

The last requirement of section 815.6 is that the contemplated injury did occur and the injury was proximately caused by failure of the public entity to discharge its duty.[327] The school district, then, could be liable for injuries to students and staff members caused by crime and violence if the school district failed to carry out its duty to make schools safe.[328] The school district, as provided in section 815.6, may avoid this liability for injuries due to crime and violence only if the district establishes that it exercised reasonable diligence to make schools safe.[329]

A student or staff member of a public school may recover damages from the school district if he proves the school district failed to discharge its duty to make schools safe or failed to use reasonable diligence to discharge its duty and if he proves he is injured as a proximate result of the school district's failure. The damages recoverable under this theory are compensatory only, as section 818 exempts a public entity from punitive damages.[330] A student or staff member, however, need not resort to a theory of negligence to recover damages for a violation of his constitutional right to safe schools.

B. Constitutional Remedy

To recover damages against the state under a negligence cause of action, a specific statute must allow the action.[331] In California, however, enabling legislation is not necessary to recover damages for constitutional deprivations.[332] The principle that a cause of action for damages arises from a violation of California constitutional rights was subscribed to by the appellate court in *Melvin v. Reid*.[333] The court determined that the appellant's fundamental right to pursue and obtain happiness was directly invaded and the invasions must not be tolerated.[334] Appellant's action, which included a count for damages, was allowed to proceed despite the trial court's judgment of dismissal.[335]

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325. *See* CAL. GOV'T CODE §810.8 (defining injury under the Tort Liability Act as not limited to physical harm).
326. *See id.*
327. *See id.* §815.6.
328. *See id.*
329. *See id.*
330. *Id.* §818.
331. *See supra* notes 312-15 and accompanying text.
332. *See infra* notes 333-54 and accompanying text.
333. 112 Cal. App. 285, 297 P. 91 (1931).
334. *Id.* at 292, 297 P. at 93-94.
335. *Id.* at 292-93, 297 P. at 94.

The appellate court, in *Porten v. University of San Francisco,*[336] reaffirmed the principle that constitutional provisions afford a cause of action for damages. Porten's complaint, which included a request for damages,[337] was dismissed without leave to amend for failure to state a cause of action for the tort of invasion of privacy.[338] The California Constitution, however, declares the right to pursue privacy is an inalienable right.[339] The court held the right to privacy was self-executing and, therefore, conferred a "judicial right of action on all Californians."[340] Porten's complaint was construed as having stated a cause of action under the constitutional right, and the court overruled the dismissal.[341]

While the court in *Porten* did not specifically state that damages were an appropriate remedy, the court in *Laguna Publishing Co. v. Golden Rain Foundation*[342] left no doubt that a right to sue for damages is appropriate where a constitutional right is violated.[343] In this case the constitutional right in question was California Constitution, article I, section 2, the free speech clause.[344] The court of appeal held that the right to free speech and press deserved as much special consideration as the inalienable rights and stated that an action for damages was appropriate without enabling legislation.[345]

The safe schools provision should also afford a cause of action for damages without enabling legislation. The right to safe, secure and peaceful campuses is an inalienable right[346] as are the right to privacy[347] in *Porten* and the right to pursue and obtain happiness[348] in *Melvin*. The determination that the safe schools provision affords a cause of action for damages means only that the person whose right is violated may present evidence at trial of damages sustained as a result of the violation of the right to safe schools.[349] As stated in *Laguna*, the damages suffered would have to be actual, demonstrable, and compensatory.[350]

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336. 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976).
337. *See id.* at 827, 134 Cal. Rptr. at 840.
338. *See id.* at 828-29, 134 Cal. Rptr. at 841.
3. 9. CAL. CONST. art. I, §1.
340. 64 Cal. App. at 829, 134 Cal. Rptr. at 842.
341. *See id.* at 833, 134 Cal. Rptr. at 844.
342. 131 Cal. App. 3d 816, 182 Cal. Rptr. 813.
343. *See id.* at 853, 132 Cal. Rptr. at 835.
344. *See id.* at 851, 132 Cal. Rptr. at 833-34.
345. *See id.* at 853, 182 Cal. Rptr. at 835.
346. *See* CAL. CONST. art. I, §28(c).
347. *See id.* §1.
348. *Id.*
349. *See* 131 Cal. App. at 854, 182 Cal. Rptr. at 835. This court is only deciding if the trial court erred in not allowing plaintiff to present evidence at trial.
350. *See id.* at 850-51, 182 Cal. Rptr. at 833.

The student or staff member of a public school need not rely on an enabling statute, like section 815.6 of the Tort Claims Act, to recover damages for a violation of his right to a safe, secure and peaceful campus.[351] A cause of action for damages arises from the constitutional provision for safe schools itself.[352] In order to recover under the constitutional cause of action, the student or staff member must be able to demonstrate that actual and compensatory damages resulted from the violation of his constitutional right.[353] This right to present evidence of damages may not be denied by the courts on the ground that no statute specifically allows a remedy of damages.[354]

CONCLUSION

In June 1982, California voters manifested a desire to fight crime and violence on school campuses by amending the California Constitution to include the inalienable right to safe schools.[355] To enforce this right, California courts will impose an affirmative duty on school districts to implement plans designed to alleviate crime and violence on school campuses.[356] By deferring to the school district's judgment, the courts will assure that the most appropriate and effective methods in ridding school campuses of crime and violence will be used.[357]

School districts have used various methods successfully to prevent crime and violence on school campuses.[358] Some of these methods are very costly; however, lack of finances will not be allowed by the courts as a defense to implementing measures to fight crime and violence.[359] When inadequate funds do become a problem, the school official should consider less costly measures such as a restructuring of school policies on discipline. A clear, concise and strictly enforced policy of student discipline has been found to have a positive effect on reducing school violence and vandalism.[360] Many programs of national acclaim have been designed to reduce crime and violence on school campuses, and through similar methods California school districts may success-

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351. *See supra* notes 331-50 and accompanying text.
352. *See supra* notes 332-50 and accompanying text.
353. *See* 131 Cal. App. 3d at 850-51, 182 Cal. Rptr. at 833.
354. *See supra* notes 331-53 and accompanying text.
355. *See supra* notes 111-18 and accompanying text.
356. *See supra* notes 170-263 and accompanying text.
357. *Cf.* 17 Cal. 3d at 306, 551 P.2d at 45, 130 Cal. Rptr. at 741. The courts rely on the school districts to devise their own plans to desegregate, for the districts are better able to deal with the complexities involved with the causes of segregation. Presumably, the courts would follow the same pattern for the crime and violence problem since there are also complexities involved with the causes of crime and violence.
358. *See supra* note 204.
359. *See supra* notes 266-300 and accompanying text.
360. *See* Reeves, *supra* note 176, at 10.

fully discharge their duty to make schools safe.[361]

Through the combined efforts of the school district and the courts, the safe schools provision will certainly be more than a mere policy statement. A policy of desiring campuses to be free of crime and violence is, of course, valid, but that policy must be enforced by action. This is why the courts must impose an affirmative duty on school districts to make their schools safe.[362] The right to safe, secure and peaceful campuses is a viable, enforceable right designed to rid California schools of crime and violence so a secure and orderly educational environment may be restored to teachers and students.

Kimberly A. Sawyer

361. Several programs recently given national acclaim are: "Developing Student Responsibility for Violence on the High School campus" at Alisal High School in Salinas, California; "Southern Oregon Drug Awareness Project" at Medford, Oregon; and "Triad Education" at Elk Grove High School in Elk Grove, California. See National Council of Juvenile and Family Court Judges announcement, January 1983 (List of presentation of awards from "Focus on Youth Symposium," Reno, Nevada) (copy on file at the *Pacific Law Journal*).

362. *See supra* notes 170-263 and accompanying text.

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